Supreme Court, U.S.
FILED

(1)

No. 01 859 NOV 05 2001

OFFICE OF THE CLERK

In The Supreme Court of the United States

JESSE ALVIN CAPPS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

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34 pp

QUESTION PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether the trial court, the Court of Appeals of Virginia, and the Virginia Supreme Court erred in holding that that VA. CODE ANN. §18.2-308.2 (Michie, 1996) clearly and unambiguously divests the trial judge of all discretion respecting punishment?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jesse Alvin Capps, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Virginia, reproduced in the Appendix, herein, at Pages App. 3, and affirmed by a refusal to grant certiorari in the Supreme Court of Virginia, reproduced in the Appendix, herein, at Page App. 1.

OPINIONS BELOW

At a hearing on June 23, 2000, the trial court considered whether it had discretion under the mandatory sentencing provisions of the "project exile" statutes enacted by the Virginia General Assembly, as contained in §18.2-308.2 of the Code of Virginia, 1950, as amended. The trial court asked the parties to submit briefs on the issue of whether or not the Court had any discretion in sentencing under the law, reproduced in the Appendix, herein, at Page App. 8.

At the sentencing hearing on July 14, 2000, the Court stated that under the evidence and on the pleas, it was compelled to convict and sentence Capps in accordance with the mandatory sentence of five years, even though the Court believed that the legislature did not intend for individuals like Capps to be subjected to such a sentence and that "this is a case that cries out for discretion, reproduced in the Appendix, herein, at Page App. 9.

Capps appealed to the Virginia Court of Appeals on the grounds that there were arbitrary and unconstitutional conflicts in the sentencing provisions of §18.2-10(F) and §18.2-308.2 of the Code of Virginia, 1950, as amended. Capps argued that §18.2-308.2 specifically classified his

offense (possession of a firearm after having been previously convicted of a felony) as a Class 6 Felony while other language in the same statute establishes minimum mandatory sentences which conflict with the clear sentencing provisions for Class 6 felonies. A separate provision of the Code, §18.2-10(F) prescribes the discretionary sentencing range for a Class 6 felony. The sole purpose of §18.2-10(F) is the establishment of a system to provide a punishment range for felonies in the state of Virginia. A trial court is given discretionary authority in determining the sentence within the range of the prescribed punishment. The language of 18.2-308.2 classifies Capps' offense as a Class 6 felony but then sets forth mandatory minimums for all violations of the statute which are in direct conflict with the felony classification statute.. Therefore, it was Capps' position that §18.2-10(F), and not the other sentencing provisions of §18.2-308.2, which were controlling because criminal statutes must be construed strictly against the Commonwealth.

The Court of Appeals rejected Capps' argument and denied his petition by order entered January 25, 2001, reproduced in the Appendix, herein, at Page App. 3. Pursuant to the Rules of the Virginia Supreme Court, Capps demanded oral argument before a panel of judges of the Court of Appeals. Following oral argument, the Court of Appeals entered an order denying his petition on April 11, 2001, reproduced in the Appendix, herein, at Page App. 2.

Capps appealed to the Supreme Court of Virginia, but the Supreme Court of Virginia refused his petition for appeal on August 13, 2001, reproduced in the Appendix, herein, at Page App. 1.

The orders of the Court of Appeals and the order of the Supreme Court of Virginia are reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257 and the Supreme Court Rule 10(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

UNITED STATES CONSTITUTION AMENDMENT XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VA. CODE ANN. §18.2-10 (Michie 1996)

§18.2-10. Punishment for conviction of felony. – The authorized punishments for conviction of a felony are.

A. For Class 1 felonies, death, or imprisonment for life and, subject to subdivision (g), a fine of not more than $100, 000.

B. For Class 2 felonies, imprisonment for life or for any term not less than twenty years and, subject to subdivision (g), a fine of not more than $100,000.

C. For Class 3 felonies, a term of imprisonment of not less than five years nor more than twenty years and, subject to subdivision (g), a fine of not more than $100,000.

D. For Class 4 felonies, a term of imprisonment of not less than two years nor more than ten years, and subject to subdivision (g), a fine of not more than $100,000.

E. For Class 5 felonies, a term of imprisonment of not less than one year nor more than ten years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both.

F. For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both.

G. Except as specifically authorized in subdivision (e) or (f), or in Class 1 felonies for which a sentence of death is imposed, the court shall impose either a sentence of imprisonment together with a fine, or

imprisonment only. However, if the defendant is not a natural person, the court shall impose only a fine.

For any felony offense committed on or after January 1, 1995, the court may impose an additional term of not less than six months nor more than three years, which shall be suspended conditioned upon successful completion of a period of post-release supervision pursuant to §19.2-295.2 and compliance with such other terms as the sentencing court may require. However, such additional term may only be imposed when the sentence includes an active term of incarceration in a correctional facility.

VA. CODE ANN. §18.2-308.2 (Michie 1996)

§18.2-308.2 – Possession or transportation of firearms or concealed weapons by convicted felons; penalties; petition for permit; when issued –

A. It shall be unlawful for (i) any person who has been convicted of a felony or (ii) any person under the age of twenty-nine who was found guilty as a juvenile fourteen years of age or older at the time of the offense of a delinquent act which would be a felony if committed by an adult, whether such conviction or adjudication occurred under the laws of this Commonwealth, or any other state, the District of Columbia, the united States or any territory thereof, to knowingly and intentionally possess or transport any firearm or to knowingly and intentionally carry about his person, hidden from common observation, any weapon described in 18.2-308 A. Any person who violates this section shall be guilty of a Class 6 felony. However, any person who violates this section by knowingly and

intentionally possessing or transporting any firearm and who was previously convicted of a violent felony as defined in §17.1-805 shall not be eligible for probation, and shall be sentenced to a minimum, mandatory term of imprisonment of five years. Any person who violates this section by knowingly and intentionally possessing or transporting any firearm and who was previously convicted of any other felony shall not be eligible for probation, and shall be sentenced to a minimum, mandatory term of imprisonment of two years. The minimum, mandatory terms of imprisonment prescribed for violations of this section shall not be suspended in whole or in part and shall be served consecutively with any other sentence. Any firearm or any concealed weapon possessed, transported or carried in violation of this section shall be forfeited to the Commonwealth and disposed of as provided in §18.2-310.

B. The prohibitions of subsection A shall not apply to (i) any person who possesses a firearm or other weapon while carrying out his duties as a member of the armed forces of the United States or of the National Guard of Virginia or of any other state, (ii) any law-enforcement officer in the performance of his duties, or (iii) any person who has been pardoned or whose political disabilities have been removed pursuant to Article V, Section 12 of the Constitution of Virginia provided the Governor, in the document granting the pardon or removing the person's political disabilities, may expressly place conditions upon the reinstatement of the person's right to ship, transport, possess or receive firearms.

C. Any person prohibited from possessing, transporting or carrying a firearm under subsection A, may petition the circuit court of the jurisdiction in which he resides for a permit to possess or carry a firearm. The court, may in its discretion and for good cause shown, grant such petition and issue a permit. The provisions of this section shall not apply to any person who has been granted a permit pursuant to this subsection.

STATEMENT OF THE CASE

On or about October 27, 1999, Officers Glass and Smith of the Lynchburg Police Department responded to a call of shots fired behind a residence near some railroad tracks near Winchester and Loraine Streets. The officers arrived and walked about 200 yards and saw Capps and Cheatwood who appeared to be in possession of a .22 rifle and a shotgun. The officers explained to Capps and Cheatwood that they were investigating a report of shots fired and asked if either of them had fired a gun. Capps told Officer Smith that he and Cheatwood were working with their dogs and that he had fired his gun once.

Sgt. Pike, the game warden, took possession of the weapons and found both to be in working order. Both Capps and Cheatwood were charged with hunting without a license and unlawful discharge of a firearm within the city limits.

After records were obtained, Capps was subsequently charged with and indicted for possession of a firearm after having been convicted of a felony.

Capps plead guilty to the indictment, and the trial court heard testimony regarding his prior conviction for malicious wounding in 1982. The Court entertained argument on whether it had discretion in sentencing Capps. Finding that it had no discretionary authority, the trial court

sentenced Capps to the mandatory minimum sentence of five years.

Capps appealed his sentence to the Court of Appeals of Virginia based on the conflict between the sentencing provisions of §18.2-308.2 and §18.2-10(F). The Court of Appeals found no ambiguity existed between the states and denied his petition.

Capps appealed to the Virginia Supreme Court which denied his petition

REASONS FOR GRANTING CERTIORARI

The Commonwealth's attorney who prosecuted Capps stated that he was "troubled by the fact that [the trial court] has apparently absolutely no discretion" in sentencing under the enactment, and the Court stated that "[this] case cries out for discretion." (Excerpt of July 14, 2000 transcript, reproduced herein at Page App. 9)

At the sentencing hearing on July 14, 2000, the Court held that "this is a case where the Court needs discretion, but I don't think I've got any here." The Court further opined that "when the legislature adopted this mandatory sentence, they didn't have in mind the individuals that are now before this Court." The Court believed that by imposing the mandatory sentence on Capps, that it was doing an injustice. (Excerpt of July 14, 2000 transcript, reproduced herein at Page App. 9)

The Court of Appeals of Virginia did not specifically address Capps' argument in denying his petition.

Capps avers that this Honorable Court should review the ambiguity of the statute under which he was sentenced and resolve this ambiguity in his favor.

ARGUMENT

Virginia Code Section 18.2-308.2 states that a violation of that section is a Class 6 felony. The statute goes on to set mandatory two or five year sentences for all violations of the statute and does not allow a person to be sentenced to less than two years in prison. A Class 6 felony, under Virginia Code Section 18.2-10(F) may be punishable by probation and a sentence of less than two years.

Virginia has historically grouped its criminal offenses into certain categories or classes for sentencing purposes. The fact that an offense may be a Class 3 felony, for instance, only tells us that the range of punishment for that felony falls within certain parameters. The classification does not carry a more substantial civil disability, nor does it subject the defendant to a trial in a different court, or a trial involving different standards or procedures. Class designations relate solely to a prescribed sentence range.

In Virginia it is also possible to have unclassed offenses. For example, driving after having been declared an habitual offender can be an unclassed felony. Virginia Code Section 46.2-357 (reproduced in Appendix, herein, at App. Page 11) declares a violation of that section to be "a felony." The penalties for such an habitual offender violation are set forth in the statute and are distinct from the penalties for any classed offense. The primary distinction for habitual offender sentencing involves the imposition of a statutory minimum period of incarceration. The sentence for felony habitual offender is "not less than one year nor more than five years or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail for twelve months and no portion of such sentence shall be suspended ...." This sentence falls within the range of a Class 6 felony; however, the felony habitual offender offense is not designated as a "classed" felony, due to its incompatibility with the sentencing range allowed for a "classed" felony.

For example, a Class 6 felony allows probation or a sentence of less than 12 months in jail.. This penalty would not be allowed under the unclassed provisions of Virginia Code Section 46.2-357.

The fact that this and other similar Virginia statues recognize felony offenses without reference to a class designation for punishment must be recognized as an intended structure for sentencing provisions which differ from the provisions set forth for classed offenses.

The court stated that its sentence in this case would be an injustice. Therefore, Capps' argument relates to more than purely technical arguments concerning the state of the law. If the purpose of our judicial system is justice, such comments require close attention to the nature of the complaint.

Section 18.2-308.1 originally prohibited possession of firearms by persons convicted of felonies involving the use of a firearm. Subsequently, the legislature broadened the class of felonies in Section 18.2-308.2(A) for which the prohibition would apply to include Class 1, 2 or 3 felonies and the offenses of rape and robbery. The statute in its current form now defines the offense as a Class 6 felony and provides for mandatory minimums for all types of prior felonies.

As the Supreme Court of Virginia acknowledged in Cook v. Commonwealth, 20 Va. App. 510, 458 S.E.2d 217 (1995), "the primary objective of statutory construction is to ascertain and give effect to legislative intent....However, it is fundamental that penal statutes must be strictly construed against the state and limited in application to cases falling clearly within the language of the statute....Words of a penal law will not be extended by implication to the prejudice of the accused, and all reasonable doubt must be resolved in his favor, " citing Waller v. Commonwealth, 192 Va. 83, 88, 63 S.E. 2d 713, 716 (1951). The Court further stated that "criminal penalties" should be provided with that degree of

clarity that characterizes all criminal law, to the end that its application should not be left to conjecture."

The Virginia Court of Appeals decision in Green v. Commonwealth, 28 Va. App. 567, 507 S.E. 2d 627 (1998) is instructive on what language a mandatory sentencing statute must contain in order for it to prevail over a discretionary sentencing statute. Green, a minor, was tried and convicted as an adult pursuant to Virginia Code Section 16.1-269.1 for carjacking and use of a firearm in the commission of carjacking. He was sentenced in accordance with Virginia Code Section 18.2-53.1 (reproduced in Appendix, herein, at Page 40), which provides for a mandatory minimum sentence for the firearm offense. Green appealed, contending that he should have been given a suspended sentence, pursuant to Virginia Code Section 16.1-272(A)(1).

In deciding Green's appeal, the Virginia Court of Appeals stated that, "at first blush", Virginia Code Sections 16.1-272(A)(1) and 18.2-53.1 appear to be conflicting. However, after reviewing the two statutes, the Virginia Court of Appeals affirmed Green's sentence, finding that Section 18.2-53.1 took precedence over the juvenile code sentencing statute of Section 16.1-272(A)(1). The Virginia Court of Appeals so held because it found that Section 18.2-53.1 "contains an extremely restrictive sentencing provision, whereby:

> "Violation of this section shall constitute **a separate and distinct felony** and any person found guilty thereof shall be sentenced to a term of imprisonment of three years for a first conviction....**Notwithstanding any other provision of law**, the sentence prescribed for a violation of the provisions of this section shall not be suspended in whole or in part, nor shall anyone convicted hereunder be placed on probation." [emphasis added]. (App. 10)

The Virginia Court of Appeals found that the language contained in Section 18.2-53.1, i.e., "notwithstanding any other provision of law" makes its provisions mandatory and function without any limitation by the non-mandatory provisions of Section 16.1-272(A)(1). In construing the apparent contradictions of the two sentencing statutes, the Virginia Court of Appeals relied upon the principle that "Where the legislature has used words of a plain and definite import, the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed."

Applying the Virginia Court of Appeals' reasoning in Green to the case at bar, it is clear that the trial court and the Virginia Court of Appeals erred in finding that the trial court had no choice but to apply the mandatory sentencing provisions of Section 18.2-308.2 rather than the discretionary sentencing provisions of Section 18.2-10(f). The mandatory sentencing provisions of Section 18.2-308.2, which the trial court applied to Capps are unlike the mandatory sentencing provisions contained in Section 18.2-53.1 in two critical respects. The language of Section 18.2-53.1 states that a violation of the section constitutes "a separate and distinct" unclassed felony; whereas, a violation of Section 18.2-308.2 defines the violations as a Class 6 felony. Additionally, Section 18.2-53.1 contains the restrictive language that "notwithstanding any other provision of law, the sentence prescribed for a violation of the provisions of this section shall not be suspended...nor shall anyone convicted...be placed on probation." By contrast, Section 18.2-308.2 contains no such language.

One cannot say that the minimum mandatory provisions of the statute which impose the two and five year minimum sentences are more specific than the designation of the offense as a Class 6 felony since the Class 6 designation is historically well-defined and there is no doubt that such a

classification clearly and unambiguously sets forth well-understood sentencing provisions. It is equally ineffective to say that the language of the last legislative enactment should take precedence over any former language since the same legislature that added the two year and five year minimum mandatory sentences also left the obvious and clearly identifiable language designating the offense as a Class 6 felony. There is no language which states "notwithstanding any other provision of law" or any other such clarification. The statute clearly sets forth contradictory sentencing provisions which cannot be resolved.

The law in Virginia is that a penal statute must be strictly construed and any ambiguity or reasonable doubt must be resolved in favor the of the defendant. Cheatham v. Commonwealth, 215 Va. 286, 208 S.E.2d 760 (1972). Because Section 18.2-308.2 is a penal statute, it must be construed strictly against the Commonwealth and in favor of the accused.

Though the legislature enlarged Section 18.2-308.2 to impose minimum mandatory sentences for all grades of felonies, it did not include the restrictive language contained in Section 18.2-53.1. Instead, the legislature chose to classify Capps' offense as a Class 6 felony. Therefore, Capps should be entitled to suffer the lesser punishment for the offense under Section 18.2-10(f) rather than suffer the greater punishment under Section 18.2-308.2. Where a criminal statute may be construed as imposing a greater or lesser punishment, the court should construe it as applying to the lesser punishment. Waller v. Commonwealth, 192 Va. 83, 63 S.E. 2d 713 (1951). The minimum mandatory provisions contained in Section 18.2-308.2 cannot be reconciled with the punishment prescribed for a Class 6 felony in Section 18.2-10(f).

CONCLUSION

For the reasons stated, Jesse Alvin Capps respectfully submits that his petition for a writ be granted.

Respectfully submitted,
JESSE ALVIN CAPPS, Petitioner

By _____

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Written Notice from the Supreme Court of Virginia Refusing Petition from the Court of Appeals, August 13, 2001, Record No. 011020

Virginia: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the13th day of August, 2001.

Jesse Alvin Capps, Appellant
Against
Commonwealth of Virginia, Appellee.

Record No. 011020
Court of Appeals No. 1923-00-3
From the Court of Appeals of Virginia
Entered August 13, 2001

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,
Testee:
David B. Beach, Clerk
By: Jennifer G. Carl
Deputy Clerk

Written Notice from the Court of Appeals of Virginia, April 11, 2001, following oral argument denying the petition for appeal

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday the 11th day of April, 2001:

Jesse Alvin Capps, Appellant
Against
Commonwealth of Virginia, Appellee.

Record No. 1923-00-3
Circuit Court No. CR00011833-00
From the Circuit Court of the City of Lynchburg
Entered April 11, 2001

Before Judge Bumgardner, Retired Judges Brown and Trabue*

For the reason previously stated in the order entered by this Court on January 25, 2001, the petition for appeal in this case hereby is denied.

This order shall be certified to the trial court.

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*Retired Judges J. Howe Brown, Jr. and Kenneth E. Trabue took part in the consideration of this case by designation pursuant to Code §17.2-400

A Copy,
Testee: Cynthia L. McCoy, Clerk
By: //Deputy Clerk//

Order from the Court of Appeals of Virginia, January 25, 2001, Record No. 1923-00-3, denying the petition for appeal:

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 25th day of January, 2001.

Jesse Alvin Capps, Appellant
Against
Commonwealth of Virginia, Appellee.

Record No. 1923-00-3
Circuit Court No. CR00011833-00
From the Circuit Court of the City of Lynchburg
Entered January 25, 2001

Before Senior Judge William H. Hodges

This petition for appeal has been reviewed pursuant to Code §17.2-407(C) and is denied for the following reason:

Appellant was convicted of violating Code §18.2-308.2. He contends the trial judge abused his discretion in sentencing him to the minimum, mandatory term of imprisonment of five years under Code §18.1-308.2, rather than the penalties prescribed for a Class 6 felony.

Code §18.2-308.2 provides in pertinent part:

Any person who violates this section shall be guilty of a Class 6 felony. However, any person who violates this section by knowingly and intentionally possessing ...any firearm and who was previously convicted of a violent felony as defined in Code §17.1-805 shall not be eligible for probation, and shall be sentenced to a minimum, mandatory term of imprisonment of five years. Any person who

violates this section by knowingly and intentionally possessing . . . any firearm and who was previously convicted of any other felony shall not be eligible for probation, and shall be sentenced to a minimum, mandatory term of imprisonment of two years.

Appellant pled guilty to the instant offense of possession of a firearm after having been convicted of a felony, a violation of Code §18.2-308.2. The record indicates that appellant had previously been convicted of two counts of malicious wounding. Malicious wounding is a violent felony offense pursuant to Code §17.-1805(C).

When statutory language is clear and unambiguous, there is no need for construction by the court; the plain meaning of the enactment will be given it. Courts must give effect to legislative intent, which must be gathered from the words used, unless a literal construction would involve a manifest absurdity.

HCA Health Servs. v. Levin, 260 Va. 215, 220, 530 S.E. 2d 417, 420 (2000). Code §18.2-308.2 clearly and unambiguously specifies that when an accused knowingly and intentionally possesses a firearm and has previously been convicted of any felony, other than a violent felony, he "shall be sentenced to a minimum, mandatory term of imprisonment of five years." By prescribing a mandatory sentence, the General Assembly has divested trial judges of all discretion respecting punishment. See Parrigen v. Long, 145 Va. 637, 640-41, 134 SD.E. 562, 562-563 (1926). The record shows that appellant had previously been convicted of a violent felony offense, and he violated Code §18.2-308.2. . Accordingly, the trial judge did not err in sentencing appellant.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code §17,1-407(D) and Rule 5A:15(a). If appellant files a demand for consideration by a

three-judge panel, the demand should include a statement, not to exceed one typewritten page, identifying how this order is in error.

A Copy,
Teste:
Cynthia L. McCoy, Clerk
By: //Marty K, P. Ring//
Deputy Clerk

Judgment Order, Commonwealth v. Jesse Alvin Capps, Case No. CR00011832-00, Circuit Court of Lynchburg, Virginia, dated July 14, 2000

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF LYNCHBURG
FIPS CODE: 680

COMMONWEALTH OF VIRGINIA

vs. ORDER

Jesse Alvin Capps, Defendant

Hearing Date: July 14, 2000
Judge: Mosby G. Perrow, III
Entered JULY 14, 2000

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, Joseph A. Sanzone. The Commonwealth was represented by Ed Lustig..

On April 21, 2000, the defendant was found guilty of the following offense:

CASE NUMBER CR00011833-00
OFFENSE DESCRIPTION AND INDICATOR (F/M)
Possession of firearm by convicted Felon (F)
OFFENSE DATE 10/27/99
VA.CODE SECTION 18.2-308.2

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code §19.2-299,

Pursuant to the provisions of Code §19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing sentence, the Court inquired if the defendant desired to make a statement and if the defendant desire to advance any reason why judgment should not be pronounced.

The Court SENTENCES the defendant to:

Incarceration with the Virginia Department of Corrections for the term of: 5 years. The total sentence imposed is 5 years.

This sentence shall run consecutively with any other sentences imposed.

Costs. The defendant shall pay costs of this prosecution.

Credit for Time Served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code Section 53.1-187.

The Court, on motion of the defendant by counsel, doth suspend the execution of the aforesaid sentence to allow the defendant to perfect an appeal on condition that the defendant post an appeal bond in the amount of $500.00 secured by July 17, 2000 at 5:00 o'clock p.m.

Thereupon, the appeal bond was posted.

DEFENDANT IDENTIFICATION:
Alias: SSN: 239-66-8593 DOB: 05/05/44 Sex: Male
SENTENCING SUMMARY:
TOTAL SENTENCE IMPOSED: 5 years
TOTAL SENTENCE SUSPENDED: None
TOTAL SENTENCE TO SERVE: 5 years

Transcript of Proceedings in Commonwealth v. Capps, Case No. CR00011833-00, in the Circuit Court of Lynchburg, Virginia, before the Honorable Mosby Perrow on June 23, 2000, (Excerpt) Colloquy between Judge Perrow and the Commonwealth's Attorney regarding sentencing provisions of §18.2-308.2, Pages 18 and 22

MR. LUSTIG: Your Honor, I would be less than forthright if I told the Court that I wasn't troubled by the fact that Your Honor has apparently absolutely no discretion in this matter. At this stage though, Judge, it's my understanding of the law that it affords the court no discretion, and that Mr. Capps must be sentenced to five years.... And we would ask the Court to follow the law.

THE COURT: Well, I am duty-bound to follow the law. That's my oath, and I will do that. But the law has got to be clear.....And, you know, this case just illustrates the lack of wisdom in imposing mandatory minimum sentences, taking all discretion away from the tryer of fact. We have got a convicted felon who is rabbit hunting in the city. He's been convicted of hunting in the city and shooting in the city and he should have been. And he knows he is a felon, and I don't buy all of that. But the case cries out for discretion. The rules do say you construe criminal statute strictly against the Commonwealth in favor of the defendant. But there are other rules of construction too. If you can make sense out of the statute, we are supposed to do it. I want you to submit something in writing....

Transcript of Proceedings in Commonwealth v. Capps, Case No. CR00011833-00, in the Circuit Court of Lynchburg, Virginia, before the Honorable Mosby Perrow on July 14, 2000, (Excerpt) Judge Perrow's Ruling on the Motion to sentence Capps under the guidelines for a Class 6 felony rather than according to the mandatory minimums contained in §18.2-308.2., Pages 6-9:

THE COURT: I've given it serious consideration, and I'm a –you're—the thrust of your brief, Mr. Sanzone, I just disagree with, the specific is the mandatory. And what you've –and I think that takes precedence over the general range for the Class VI.

And I think when the legislature adopted this mandatory sentence, they didn't have in mind the individuals that are now before this Court....You, know, they don't want felons having guns. And they keep a ratcheting this out, but this is a case that cries out for discretion, but I don't have any....

If you take discretion away from your...judges, you're going to have injustice at times. And I think this is an injustice.

I'm going to – I think under the evidence and on the pleas, I'm compelled to convict [Capps], and I'm going to sentence [him] in accordance with the mandatory sentence, but I'm going to allow an appeal because I just – if Mr. Sanzone thinks he's got something, he's welcome to take

VA CODE ANN. §18.2-53.1 (Michie, 1996)

§18.2-53.1 – Use or display of firearm in committing felony. – It shall be unlawful for any person to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, forcible sodomy, inanimate or animate object sexual penetration as defined in §18.2-67.2, robbery, carjacking, burglary, malicious wounding as defined in §18.2-51, malicious bodily injury to a law-enforcement officer as defined in §18.2-51.1, aggravated malicious wounding as defined in §18.2-51.2, malicious wounding by mob as defined in §18.2-41 or abduction. Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a term of imprisonment of three years for a first conviction, and for a term of five years for a second or subsequent conviction under the provisions of this section. Notwithstanding any other provision of law, the sentence prescribed for a violation of the provisions of this section shall not be suspended in whole or in part, nor shall anyone convicted hereunder be placed on probation. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.

VA. CODE ANN. §46.2-357 (Michie, 1998)

§46.2-357. Operation of motor vehicle or self-propelled machinery or equipment by habitual offender prohibited; penalty; enforcement of section. -

A. It shall be unlawful for any person determined or adjudicated an habitual offender to drive any motor vehicle or self-propelled machinery or equipment on the highways of the Commonwealth while the revocation of the person's driving privilege remains in effect. However, the revocation determination hall not prohibit the person from operating any farm tractor on the highways when it is necessary to move the tractor from one tract of land used for agricultural purposes to another tract of land used for agricultural purposes, provided that the distance between the said tracts of land is no more than five miles.

B. Except as provided in subsection D, any person found to be an habitual offender under this article, who is thereafter convicted of driving a motor vehicle or self-propelled machinery or equipment in the Commonwealth while the revocation determination is in effect, shall be punished as follows:

1. If such driving does not of itself endanger the life, limb, or property of another, such person shall be guilty of a Class 1 misdemeanor punishable by a minimum, mandatory term of confinement in jail for not less than ten days, which shall not be suspended except in cases designated in subdivision 2(ii) of this subsection.

2. If such driving of itself endangers the life, limb, or property of another or takes place while such person is in violation of §§18.2-36.1, 18.2-51.4, 18.2-266 or §46.2-341.24, irrespective of whether the driving of itself endangers the life, limb or property of another and the person has been previously convicted of a violation of §§18.2-.36.1, 18.2-51.4, 18.2-266 or §46.2-341.24,, such person shall be guilty of a felony punishable by confinement in a state correctional facility for not less than one year nor more than five years or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail for twelve months and no portion of such sentence shall be suspended. However, (i) if the sentence is more than one year in a state correctional facility, any portion of such sentence in excess of one year may be suspended or (ii) in cases wherein such operation is necessitated in situations of apparent extreme emergency which require such operation to save life or limb, said sentence, or any part thereof may be suspended. For the purposes of this section, an offense in violation of a valid local ordinance, or law of any other jurisdiction, which ordinance or law is substantially similar to any provision of law herein shall be considered an offense in violation of such provision of law.

3. If the offense of driving while a determination as an habitual offender is in effect is a second or subsequent such offense, such person shall be punished as provided in subdivision 2 of this subsection, irrespective of whether the offense, of itself, endangers the life, limb, or property of another.

C. For the purposes of enforcing this section, in any case in which the accused is charged with driving a motor vehicle or self-propelled machinery or equipment while his license, permit or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing the charge shall determine whether the person has been determined an habitual offender and, by reason of this determination, is barred from driving a motor vehicle or self-propelled machinery or equipment on the highways in the Commonwealth. If the court determines the accused has been determined to be an habitual offender and finds there is probable cause that the alleged offense under this section is a felony, it shall certify the case to the circuit court of its jurisdiction for trial.

D. Notwithstanding the provisions of subdivisions 2 and 3 of subsection B, following conviction and prior to imposition of sentence with the consent of the defendant, the court may order the defendant to be evaluated for and to participate in the Boot Camp Incarceration Program pursuant to §19.2-316.1, or the Detention Center Incarceration Program pursuant to §19.2-316.2, or the Diversion Center Incarceration Program, pursuant to §19.2-316.3.